P&P File # P155967

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (Newark)

DANIEL BOCK, JR.	:	**2:11-cv-07593-KM-SCM**
Plaintiff	:	
vs.	:	
PRESSLER & PRESSLER, LLP,	:	
Defendant	:	

DEFENDANT'S BRIEF REGARDING
SUBJECT MATTER JURISDICTION

Dated: October 3, 2016

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In accordance with the Court's September 2, 2016 Order (ECF #82) Defendant Pressler & Pressler, LLP submits this brief. Defendant asserts that the Court lacks subject matter jurisdiction in this case for the following reasons:

1. *Spokeo* and Article III

Article III of the United States Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992); U.S. Const. art. III, § 2, cl. 1. To invoke this power, a litigant must have standing. *Hollingsworth v. Perry,* 133 S. Ct. 2652, 2661 (2013). Standing consists of three elements: (1) an "injury-in-fact" that is (2) fairly traceable to the defendant's conduct and that is (3) likely to be redressed by a favorable court decision. *Lujan,* 504 U.S. at 560. Of the three elements, injury-in-fact is "the 'first and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635, 643 (2016) (internal citations omitted). The plaintiff bears the burden of proving standing. Historically, the United States Supreme Court has described an "injury-in-fact" as "an invasion of a legally protected interest," and has noted that such interests must be both "(a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). More recently, the *Spokeo* Court confirmed that, "A 'concrete' injury must be '*de facto,*' that is, it must actually exist; it must be 'real,' not 'abstract.'" *Spokeo*, 136 S. Ct. at 1547, 194 L. Ed. 2d at 643

Spokeo addressed whether an alleged violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et. seq.*, was sufficient to confer Article III standing where the plaintiff alleged no "actual or imminent harm." The Court reversed the Ninth Circuit's conclusion that an alleged procedural violation of the FCRA was sufficient "injury in fact" for Article III purposes because the Ninth Circuit failed to analyze whether Robins' alleged statutory injury was "concrete." *Spokeo*, 578 U.S. ___, 136 S. Ct. at 1550, 194 L. Ed. 2d at 646. The Court specifically held, "An injury in fact must also be 'concrete.' Under the Ninth Circuit's analysis, however, that independent requirement was elided… We have made it clear time and time again that an injury must be both concrete *and* particularized." *Id.*, 136 S. Ct. at 1548, 194 L. Ed. 2d at 644. Put differently, the Court reminded the Ninth Circuit of its obligation to analyze whether Robins' injury was "real" and not "abstract." *Id.*

The Supreme Court reiterated that, contrary to the Ninth Circuit's conclusion, a party does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. **For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.**" *Id.*, 136 S. Ct. at 1549, 194 L. Ed. 2d at 645. (Emphasis added). Thus, if an injury does not "cause harm or present a material risk of harm," it lacks the concreteness required to establish the existence of an injury-in-fact for Article III purposes, even if such injury constitutes a statutory violation. *Id.*

2. Bock Alleged No Injury-in-Fact

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et. seq.*, identifies three different classes of damages: actual damages, statutory damages, and costs. 15 U.S.C. § 1692k(a)(1)-(3); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 578, 130 S. Ct. 1605, 1609, 176 L. Ed. 2d 519, 525 (2010). The statutory scheme specifically differentiates between actual damages, which arise from actual, tangible harm to the consumer, and statutory damages, which stem solely from a technical or procedural violation of the FDCPA. The purpose of this differentiation is to deter statutory violations by allowing consumers to recover statutory damages *even if the consumer suffers no actual damages*. *Barrows v. Chase Manhattan Mortg. Corp.*, 465 F. Supp.2d 347, 354 (D.N.J. 2006). While a consumer may recover statutory damages of up to $1,000.00 for a violation of the FDCPA, a consumer seeking recovery of actual damages must plead and prove such damages. *Deeters v. Phelan Hallinan & Schmieg, LLP*, 2013 U.S. Dist. LEXIS 173845 (W.D. Pa. 2013) (a plaintiff bears the burden of pleading damages under the FDCPA). In the present case, Bock failed to meet that burden.

Bock's Complaint alleged no actual damages, and instead sought only statutory damages of up to $1,000.00 plus attorney's fees and costs. *See* Complaint, p. 7, ¶ 45 ("Based on any one of those violations, PRESSLER is liable to BOCK for statutory damages, attorney's fees and costs."). Bock alleged no "injury in fact," going so far as to stipulate that his recovery in the event of a victory would consist solely of $1,000.00 in statutory damages:[1]

> 2. **The Complaint's prayer for damages was for "statutory damages" pursuant to 15 U.S.C. § 1692k(a)(2)(A), which are limited to $1,000.00.**
>
> 3. To avoid the time and expenses of preparing the ordered letter briefs and for the purpose of judicial economy, Plaintiff and Defendant stipulate to $1,000.00 as the amount of Plaintiff's damages.

See ECF Document 63. Thus, not only did Mr. Bock stipulate that his entitlement to damages was capped at $1,000.00, but he also stipulated that such damages were "statutory damages" only – that is, Bock judicially admitted that he sustained no actual damage as a result of Pressler's alleged violation of the FDCPA. As a consequence, this Court need not analyze whether Bock has pled the existence of an "intangible injury… sufficient in some circumstances to constitute injury in fact." He has already admitted to the absence of any such "injury-in-fact," and has acknowledged that the only "injury" in existence is a procedural, statutory one.[2]

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[1] The stipulation, itself, cannot satisfy *Spokeo's* injury-in-fact requirement. Parties cannot contractually confer subject matter jurisdiction that does not otherwise exist. Because "standing is an Article III requirement for jurisdiction, the parties do not have the power to confer such jurisdiction upon the Court by conceding the standing of certain plaintiffs." *Barhold v. Rodriguez,* 863 F.2d 233, 234 (2d. Cir. 1998); *see also Wilson v. Glenwood Intermountain Properties*, 98 F.3d 590, 593 (10th Cir. 1996) (rejecting district court's finding that defendants conceded plaintiffs had standing because "parties cannot confer subject matter jurisdiction on the courts by agreement"); *see also Golden v. V.I.*, 47 Fed. Appx. 620, 622 (3d. Cir. 2002).

[2] Such an argument would fail even in the absence of Bock's admission, because the Supreme Court held that "a bare procedural violation, divorced from any concrete harm," cannot "satisfy the injury-in-fact requirement of Article III." *Spokeo*, 578 U.S. at ___, 136 S. Ct. at 1542, 194 L. Ed. 2d at 635. It is the absence of any "concrete harm" to Bock which mandates the conclusion that the district court lacks Article III jurisdiction.

In fact, it is difficult to conceive of what concrete injury Bock could have suffered. He was sued on a debt that he does not deny owing, in a suit that he settled (while represented by the same attorney who filed this action on his behalf). He made no claim that he was sued by the wrong creditor, in the wrong venue, on the wrong debt, or for the wrong amount. His sole claim is that Pressler & Pressler's associate attorney, Ralph Gulko, did not spend enough time reviewing the two-sentence, form allegation asserting the simple, book account type of complaint on which Bock was sued, and that Pressler & Pressler did not do enough work in representing its own client. None of Pressler & Pressler's alleged acts or omissions would or could cause a concrete injury to Mr. Bock – a fact he has recognized from the inception of this case.

While *Spokeo* was remanded to the Ninth Circuit for a determination of whether the allegedly false information disseminated by Spokeo involved a risk of harm "sufficient to meet the concreteness requirement," no such analysis is warranted here given Bock's complaint and his admission that the only "injury" at issue in this case is a purely statutory violation. Accordingly, this Court should vacate its summary judgment order and dismiss this case for want of subject matter jurisdiction.

3. Post-*Spokeo* Cases

The Ninth Circuit has issued no opinion in response to the Supreme Court's remand in *Spokeo.* However, two Courts of Appeals have analyzed the issue of standing post-*Spokeo*, and their decisions further illustrate the propriety of dismissal of Mr. Bock's claim for lack of subject matter jurisdiction.

In *Hancock v. Urban Outfitters, Inc.*, 2016 U.S. App. LEXIS 13548 (D.C. Cir., July 26, 2016), the plaintiffs filed a putative class action in federal court, alleging that the defendants had violated two District of Columbia consumer protection laws by requesting the plaintiffs' zip codes when the plaintiffs made purchases with their credit cards. The district court refused to address the Article III jurisdiction issue, instead dismissing the case pursuant to Fed. R. Civ. P. 12(b)(6). The plaintiffs appealed, and the appeal was stayed pending the outcome of *Spokeo*. In July, the D.C. Circuit Court of Appeals found that the district court erred when it bypassed the jurisdictional question of the plaintiffs' standing:

> The complaint here does not get out of the starting gate. It fails to allege that Hancock or White suffered any cognizable injury as a result of the zip code disclosures. Indeed, at oral argument, Hancock's and White's counsel candidly admitted that "the only injury * * * that the named plaintiffs suffered was they were asked for a zip code when * * * [under] the law they should not have been." Oral Arg. Tr. 5. In other words, they assert only a bare violation of the requirements of D.C. law in the course of their purchases.

The Court of Appeals rejected the argument that the actual or threatened injury required by Article III "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." The Court further rejected the notion that the defendants' mere request for plaintiffs' zip codes, standing alone, amounted to an Article III concrete injury. Contrasting other types of claims, the Court found that the plaintiffs "do not allege, for example, any invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury." For those reasons, the Court of Appeals vacated the district court's judgment and remanded the case with instructions to dismiss for lack of subject matter jurisdiction.

By contrast, in *Church v. Accretive Health, Inc.*, 2016 U.S. App. LEXIS 12414 (11th Cir., July 6, 2016) Church alleged that Accretive Health, Inc. failed to provide the plaintiff with certain disclosures mandated by 15 U.S.C. § 1692g(a). Accretive argued that Church's injury was not sufficiently concrete to confer Article III standing because Church incurred no actual damages from this alleged violation of the FDCPA. Church responded that Article III's requirement of an injury-in-fact could be satisfied by alleging a violation of a procedural right granted by statute. The 11th Circuit Court of Appeals agreed, holding:

> . . . Church alleged injury to her statutorily-created right to information pursuant to the FDCPA. The FDCPA creates a private right of action, which Church seeks to enforce. The Act requires that debt collectors include certain disclosures in an initial communication with a debtor, or within five days of such communication. *See* 15 U.S.C. § 1692e(11); 1692g(a)(1)-(5). The FDCPA authorizes an aggrieved debtor to file suit for a debt collector's failure to comply with the Act. *See* 15 U.S.C. § 1692k(a) ("[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person . . . .") Thus, through the FDCPA, Congress has created a new right--the right to receive the required disclosures in communications governed by the FDCPA--and a new injury--not receiving such disclosures.

Church, 2016 U.S. App. LEXIS 12414 at *8 - *9 (footnote omitted).

The Court of Appeals noted that Congress specifically mandated that consumers (like Church) be given certain notices of rights. Accretive's failure to provide her with notice of such rights deprived her of the opportunity to exercise them. This, the Court of Appeals held, constituted a "concrete injury" sufficient to satisfy Article III.

Both *Hancock* and *Church* are consistent with Pressler's assertion that this case must be dismissed for lack of subject matter jurisdiction. "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549, 194 L. Ed. 2d at 645. The Supreme Court explained:

> In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U. S. 765, 775-777, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000). In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in Lujan that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 504 U. S., at 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351. Similarly, Justice Kennedy's concurrence in [***16] that case explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or

> controversy where none existed before." Id., at 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (opinion concurring in part and concurring in judgment).

The *Hancock* Court recognized that the plaintiffs' claimed "injury" – that they were asked for a zip code – did not rise to the level of "concreteness" necessary to confer Article III standing because they pled nothing more than a bare technical violation of a statutory requirement. *Hancock, supra.* The *Church* court recognized that the notices mandated by the FDCPA (which ensure that consumers know who their creditor is, what the balance is, who the original creditor is, and what they must do to dispute or obtain verification of the debt) represent a substantive right created by Congress to serve the underlying purposes of the FDCPA. Failure to provide those notices is not a mere procedural technicality, such as the technical violation pled in *Hancock*.

Here, as in *Hancock*, "meaningful attorney involvement" is not a right elevated by Congress to a concrete injury; instead, it is a creation of common law that has historically been raised with no claim of actual damages and no consideration given to Article III standing, and for good reason – an absence of "meaningful attorney involvement" as pled by Bock causes no concrete injury. Bock does not complain that Pressler sued him for the wrong account, in the wrong venue, or for the wrong amount. He does not allege abuse of process, malicious prosecution, or any other form of abuse of the courts. His sole contention is that in preparing its suit against him, Pressler's attorneys should have taken more time to review the brief, accurate and undisputed allegations contained in the collection complaint. Respectfully, this is not a 'concrete injury;" indeed, it is no injury at all. Bock thus lacks Article III standing, and on that basis the court should vacate its summary judgment order and this suit should be dismissed.

CONCLUSION

WHEREFORE, Defendant requests that the Court vacate its order of June 30, 2014, find that Plaintiff lacks Article III standing, and dismiss this case for want of subject matter jurisdiction. Defendant further requests all such other and further relief as to which it may be justly entitled.

Dated: October 3, 2016

Respectfully submitted,

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